

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35946

STATE OF IDAHO,)	2009 Unpublished Opinion No. 717
)	
Plaintiff-Respondent,)	Filed: December 10, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
DIANE ANDERSON,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Cheri C. Copsy, District Judge. Hon. Thomas P. Watkins, Magistrate.

District court’s intermediate appellate decision affirming the judgment of conviction for misdemeanor injury to a child, affirmed.

Alan E. Trimming, Ada County Public Defender; Erik J. O’Daniel, Deputy Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

Diane Anderson appeals from the district court’s intermediate appellate decision affirming the judgment of conviction entered upon a jury verdict finding her guilty of misdemeanor injury to a child. We affirm.

I.

FACTS AND PROCEDURE

On March 23, 2006, the state filed a complaint against Anderson charging her with five counts: one count each of felony injury to a child, misdemeanor injury to a child, and misdemeanor assault and two counts of misdemeanor disturbing the peace. The complaint included the following language pertaining to the count relevant to this appeal:

[Anderson] . . . did commit the crime[] of : I. INJURY TO A CHILD, FELONY, I.C. §18-1501(1) . . . as follows:

COUNT I

That [Anderson] . . . did under circumstances likely to produce great bodily harm or death, commit an injury upon a child under the age of eighteen years of age, to-wit: [E.A.] of the age of fourteen (14) years, by unlawfully and wilfully [sic] causing or permitting the child to be placed in a situation endangering his health or person, while having care and/or custody of the child, by driving a truck for almost a mile during an electrical rain storm with the child clinging to remain on the truck with the car door open and causing him to jump from the truck in order to avoid a collision with a building.

At a pretrial conference the state amended Count I by interlineation from a felony to a misdemeanor and struck the phrase “under circumstances likely to produce great bodily harm or death” from the text of Count I. On the day of trial, the state filed an amended complaint, containing Counts I, II, IV, and V from the original complaint (as modified at the pretrial conference)--specifically, two counts of misdemeanor injury to a child and two counts of misdemeanor disturbing the peace.¹ In regard to Count I, the amended complaint labeled the charge as a misdemeanor and referenced I.C. § 18-1501(2), the provision applicable to misdemeanor injury to a child. However, the amended complaint still included the phrase “under circumstances likely to produce great bodily harm or death” as opposed to the phrase “under circumstances or conditions other than those likely to produce great bodily harm or death” which is contained in the misdemeanor injury to a child subsection.

On Anderson’s motion, Counts I and II were severed from the other charges and the case proceeded to trial on two counts of misdemeanor injury to a child. When the trial commenced, the magistrate notified the jury that Anderson was charged with two counts of misdemeanor injury to a child, but did not read the amended complaint to the jury.

After the state rested, Anderson filed a motion requesting an Idaho Criminal Rule 29² judgment of acquittal on the grounds that the language of Count I in the amended complaint, despite being labeled as a misdemeanor and referencing I.C. § 18-1501(2), effectively charged

¹ The original misdemeanor assault count was dismissed by the state.

² Idaho Criminal Rule 29(a) provides in part:

The court on motion of the defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, information or complaint after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

her with felony injury to a child. Anderson contended this required a judgment of acquittal, because the district court had previously held that the evidence was insufficient to support a felony conviction for injury to a child. The magistrate denied the motion.

At the conclusion of the trial, the magistrate instructed the jury on the elements of misdemeanor injury to a child in regard to Count I.³ Anderson did not object to the instruction. The jury returned a verdict of guilty on Count I, but acquitted Anderson of Count II. Anderson appealed to the district court, arguing that a fatal variance existed between Count I of the amended complaint and Instruction No. 12 and that the magistrate had erred in denying her motion for judgment of acquittal under Rule 29. The district court affirmed the conviction, and Anderson now appeals.

II. ANALYSIS

On appeal, Anderson argues that there was a fatal variance between the complaint filed by the state and the instructions given the jury at trial, that the magistrate erred when he denied her motion for judgment of acquittal, and that there was insufficient evidence to support the jury's guilty verdict.

On review of a decision rendered by a district court in its intermediate appellate capacity, we directly review the district court's decision. *State v. DeWitt*, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008).

³ Specifically, the magistrate gave the following instruction consistent with the pattern criminal jury instruction (Idaho Criminal Jury Instruction 1243) approved by the Idaho Supreme Court:

INSTRUCTION NO. 12

In order for the defendant to be guilty of Injury to a Child, the state must prove each of the following:

1. On or about May 19, 2006
2. in the state of Idaho
3. the defendant Diane Anderson
4. had the care or custody of [E.A.]
5. who was a child under 18 years of age, and
6. the defendant willfully caused or permitted the child to be placed in situation that may have endangered the child's person or health. . . .

A. Variance

Anderson argues that a fatal variance existed between the language in Count I of the amended complaint (which included the phrase “under circumstances likely to produce great bodily harm or death”) and the corresponding elements instruction given to the jury on that count (which tracked the misdemeanor injury to a child instruction and did not include the phrase at issue). Specifically, Anderson claims that the instruction on the elements for Count I “deprived [the jury] of the opportunity to decide whether or not the state had proved what it specifically alleged.” As a result, she contends, this alleged variance between the instruction and the amended complaint resulted in a fundamental error necessitating a judgment of acquittal. The state insists that Anderson’s claim fails for two reasons--first, that Anderson did not object to the jury instruction at trial and therefore cannot challenge it for the first time on appeal and second, that no variance existed, let alone a fatal variance that prejudiced her substantial rights.

Whether there is a variance between a charging document and the evidence and jury instructions presented at trial is a question of law over which we exercise free review on appeal. *State v. Sherrod*, 131 Idaho 56, 57, 951 P.2d 1283, 1284 (Ct. App. 1998). Likewise, we exercise free review over the question of whether such a variance, if it exists, is fatal to a conviction. *Id.* at 59, 951 P.2d at 1286.

Even assuming, without deciding, that Anderson may raise this issue for the first time on appeal, her claim fails because the language used in Count I of the amended complaint compared to the language used in the elements jury instruction does not constitute a fatal variance. A variance arises when the evidence adduced at trial establishes facts different from those alleged in the charging document. *Dunn v. United States*, 442 U.S. 100, 105 (1979). Even if a variance exists, it requires reversal of a conviction only where the defendant was deprived of fair notice of the charge against which he must defend or is left open to the risk of double jeopardy. *State v. Wolfrum*, 145 Idaho 44, 47, 175 P.3d 206, 209 (Ct. App. 2007); *State v. Jones*, 140 Idaho 41, 49, 89 P.3d 881, 889 (Ct. App. 2003).⁴ The notice requirement of due process requires courts to determine whether the record suggests the possibility that the defendant was misled or

⁴ Our appellate courts have noted that protection against future double jeopardy is no longer the concern that it once was, because the availability of trial transcripts allows for a more thorough, subsequent determination of exactly what was before a court in a prior prosecution. *State v. Windsor*, 110 Idaho 410, 418 n.1, 716 P.2d 1182, 1190 n.1 (1985); *State v. Montoya*, 140 Idaho 160, 166 n.6, 90 P.3d 910, 916 n.6 (Ct. App. 2004).

embarrassed in the preparation or presentation of his defense such that it is fatal to the conviction. *State v. Hickman*, 146 Idaho 178, 182, 191 P.3d 1098, 1102 (2008).

In this case, assuming for the purposes of argument that there was a variance, Anderson has not shown she was misled or embarrassed in the preparation of her defense. It was clear that the state was pursuing a misdemeanor as opposed to a felony charge in regard to Anderson's alleged endangerment of E.A. At a pre-trial hearing attended by Anderson, the state amended the complaint from a felony to a misdemeanor. The amended complaint--which Anderson did not object to--explicitly indicated that the state was prosecuting Anderson for two counts of misdemeanor injury to a child and listed the misdemeanor subsection of I.C. § 18-1501 next to each count. In addition, as the district court pointed out, the precise reason the case was transferred to the magistrate was because the felony injury to a child charge was reduced to a misdemeanor. Finally, the elements jury instruction given to the jury was that concerning misdemeanor injury to a child--an instruction that Anderson also did not object to. Thus, the only reasonable conclusion is that Anderson was aware that the state was charging her with misdemeanor injury to a child in regard to E.A. at least two months before the commencement of trial. *See State v. Windsor*, 110 Idaho 410, 417-18, 716 P.2d 1182, 1189-90 (1985) (holding that where the defendant was charged by information only with premeditated murder but the jury instructions allowed for the conviction of premeditated murder or felony murder based on the perpetration of a burglary, Windsor was not misled or embarrassed in her defense because it was clear from the beginning of the case that the state intended to proceed on both premeditated and felony murder theories); *State v. Montoya*, 140 Idaho 160, 166, 90 P.3d 910, 916 (Ct. App. 2004) (holding that a variance was harmless even where--without giving the defendant notice prior to trial--the jury was given an instruction allowing the defendant to be convicted for acts additional to those listed in the charging document). On the facts of this case, we cannot say that Anderson was thwarted in her preparation for trial and therefore conclude that any variance existing between the amended complaint and the jury instruction was not fatal to the conviction.

B. Judgment of Acquittal and Sufficiency of the Evidence

Anderson contends that the district court erred in affirming the magistrate's denial of her Rule 29 motion for judgment of acquittal, because the state failed to prove that she acted "under circumstances likely to produce great bodily harm or death" as alleged in the amended complaint. Anderson also argues for the first time on appeal that insufficient evidence existed to

support the jury verdict finding her guilty of misdemeanor injury to a child. As both of Anderson's arguments hinge on the sufficiency of the evidence, we address them together.

The test applied when reviewing a court's ruling on a motion for a judgment of acquittal is to determine whether the evidence was sufficient to sustain a conviction of the crime charged. *State v. Fields*, 127 Idaho 904, 912-13, 908 P.2d 1211, 1219-20 (1995). When reviewing the sufficiency of the evidence where a judgment of conviction has been entered upon a jury verdict, the evidence is sufficient to support the jury's guilty verdict if there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt. *State v. Herrera-Brito*, 131 Idaho 383, 385, 957 P.2d 1099, 1101 (Ct. App. 1998); *State v. Knutson*, 121 Idaho 101, 104, 822 P.2d 998, 1001 (Ct. App. 1991). We will not substitute our view for that of the jury as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. *Knutson*, 121 Idaho at 104, 822 P.2d at 1001; *State v. Decker*, 108 Idaho 683, 684, 701 P.2d 303, 304 (Ct. App. 1985). Moreover, we will consider the evidence in the light most favorable to the prosecution. *Herrera-Brito*, 131 Idaho at 385, 957 P.2d at 1101; *Knutson*, 121 Idaho at 104, 822 P.2d at 1001.

On appeal from the magistrate division, the district court examined the sufficiency of the evidence in the context of Anderson's contention that the court erred in denying her motion for a judgment of acquittal and offered the following summary:

At trial the State called [E.A.] and [J.A.], Anderson's sons, and Deputy Jason Jones of the Ada County Sheriff's Office. [E.A.], the subject of Count I, testified that Anderson was his mother and that he was fourteen years of age when the incident happened. He testified that it was raining on the day in question and that his mother came to his father's house when she was not supposed to be there. [E.A.] testified that Anderson told his siblings to get in her vehicle and he refused. However, his brother [J.A.] got into her vehicle. [E.A.] testified that he tried to convince [Anderson] not to take [J.A.] with her because she was not supposed to take the children. He testified that she began driving with [E.A.] hanging at the opening of the passenger's side door while he was trying to convince her to leave [J.A.] there. Both passenger doors were open and he was between them with his umbrella being the only thing preventing the doors from hitting him. She did not stop even though [E.A.] was on his knees holding onto the headrest. He testified that she continued down the street, telling him to get off. She continued driving and sped up at one point and went through a dip. He felt a little shaken but was not afraid that he would fall off. Once they got to Amity [Road], she sped up. She drove all the way to her home with him hanging on. [J.A.'s] testimony was

consistent with [E.A.'s] testimony. [J.A.] was seven at the time of the trial. He testified that he was afraid [E.A.] would fall.

As mentioned above, it was clear to all parties that the state was pursuing a charge of misdemeanor injury to a child in regard to E.A., thus it was required to prove that on the date in question (1) Anderson had care or custody of the child, (2) who was under eighteen (18) years of age, and that (3) Anderson willfully caused or permitted the child to be placed in a situation that may have endangered the child's person or health. I.C. § 18-1501(2). Anderson contends that the evidence presented at trial was insufficient to support the jury verdict of guilty as to Count I, because, she claims, there was "insufficient evidence to support a jury verdict that [she] had 'care or custody' of [E.A.], that this was willful action on the part of Anderson, and that the situation may have endangered [E.A.'s] health."

We conclude that there was sufficient evidence that a reasonable trier of fact could find beyond a reasonable doubt that each of the elements of misdemeanor injury to a child was proved such that the district court did not err in affirming the magistrate's denial of Anderson's motion for judgment of acquittal and that we reject Anderson's sufficiency of the evidence challenge to her conviction. First, there was sufficient evidence presented that E.A. was within the "care or custody" of Anderson. This Court has noted that the injury to a child statute does not define "care or custody" and therefore in the absence of a statutory definition we look to the ordinary meaning of the word and the context in which it is used. *State v. Morales*, 146 Idaho 264, 266-67, 192 P.3d 1088, 1090-91 (Ct. App. 2008). Discussing the meaning of "care or custody," in *Morales* we stated:

"Care" is defined as "CHARGE, SUPERVISION, MANAGEMENT: responsibility for or attention to safety and well-being." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 338 (1993). *See also People v. Culuko*, 78 Cal. App. 4th 307, 92 Cal. Rptr. 2d 789, 808 (2000) (holding that there is "no special meaning to the terms 'care and custody' beyond the plain meaning of the terms themselves. The terms 'care or custody' do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver." (quoting *People v. Cochran*, 62 Cal. App. 4th 826, 73 Cal. Rptr. 2d 257, 261 (1998))); *State v. Jones*, 188 Ariz. 388, 937 P.2d 310, 314 (1997) (employing the same dictionary definition quoted above and concluding that "both 'custody' and 'care,' as they relate to A.R.S. § 13-3623, imply accepting responsibility for a child in some manner").

Morales, 146 Idaho at 267, 192 P.3d at 1091. Given that E.A. was Anderson's minor son and that she was the sole adult present when this incident occurred, we conclude that there was

sufficient evidence presented upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving that Anderson had care or custody of her son. That Anderson had not intended to pick up E.A. when she arrived at his father's house is irrelevant--when Anderson removed him from the premises, he was in her charge and under her responsibility by virtue of her parental role.

There was also sufficient evidence presented that E.A. was endangered by a "willful action" on the part of Anderson. The willfulness element of the endangerment clause from I.C. § 18-1501 requires that the person providing care or custody of the child willfully endanger the child by subjecting the child to a known risk of harm. *Id.*; *State v. Halbesleben*, 139 Idaho 165, 170, 75 P.3d 219, 224 (Ct. App. 2003). This does not require that the defendant intended to harm the child, but it does require that the defendant placed the child in a potentially harmful situation with knowledge of the danger. *Id.* In her brief Anderson contends that E.A. could not have been endangered by her willful action, because E.A. had jumped on the car out of his own volition and did not get off even though Anderson stopped the vehicle several times and directed him to. Anderson overlooks the fact, however, that while E.A.'s presence on the vehicle may not have been a product of her volition, her continuing to drive the vehicle while he was clinging to the outside of the car was.

Finally, there was sufficient evidence presented that the situation may have endangered E.A.'s health. We need only address this argument by stating that a reasonable trier of fact could have concluded that driving a vehicle on a public street in a storm while a child is hanging onto the outside of the vehicle endangers the health of that child.

For the reasons stated above we conclude that the district court did not err in affirming the magistrate's denial of Anderson's motion for judgment of acquittal and we also conclude that Anderson's challenge to the sufficiency of the evidence on appeal is without merit.

III.

CONCLUSION

The district court did not err in concluding that there was not a fatal variance between the amended complaint and the instruction given the jury on the elements of misdemeanor injury to a child. In addition, the district court did not err in affirming the magistrate's denial of Anderson's motion for judgment of acquittal as there was sufficient evidence whereby a reasonable trier of fact could conclude beyond a reasonable doubt that the Anderson was guilty of misdemeanor

injury to a child. Accordingly, we affirm the intermediate appellate decision of the district court affirming Anderson's judgment of conviction for misdemeanor injury to a child.

Chief Judge LANSING and Judge GRATTON **CONCUR.**